

Rights Adrift: Sexual Violence Against Rohingya Women on the Andaman Sea

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Abstract

Women fleeing Myanmar in 2015 were trapped on the Andaman Sea for months when States in the region closed off places of disembarkation. Among the horrors of starvation and unsanitary conditions experienced on the boats, they faced additional risks of sexual violence. These women fled from a situation in Myanmar that severely curtailed their rights, including gender violence, which is being tried as genocide at the International Court of Justice, and were exposed to further violations while fleeing. Through interviews with survivors of the journey and those who assisted them, this article describes the experiences of these women at sea. It outlines the failure of States to apply customary principles of international law and related regional standards to protect these women. From a feminist legal theory perspective, it explores the reasons

for these failures and recommends reforms to guarantee better protection at sea for women in the future.

Keywords

feminist legal theory – Rohingya – Myanmar – refugee women – sexual and gender-based violence – *non-refoulement* – trafficking – protection at sea

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‘They were taken one by one. They were taken every day. Sometimes in the morning, afternoon, evening and every day. Girls were crying, and other women were scared.’¹

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1 Introduction*

Rohingya people have been fleeing from Myanmar across the Andaman Sea for decades.² During a peak in movements in 2015, approximately 15 per cent of passengers were Rohingya women and girls,³ many of them *en route* to join husbands they had never met in Malaysia.⁴ These movements made international headlines when, in May 2015, States closed their borders to these boats following the discovery of mass graves at sites used by traffickers to hold Rohingya hostage in southern Thailand, and a dramatic game of ‘human ping-pong’⁵

* The views expressed herein are those of the authors and do not necessarily reflect the views of the United Nations. The authors would like to thank Christine Forster, Keane Shum, Sara Davies, Siobhan McDonnell and Sue Robertson for their insightful and constructive comments on earlier drafts of this article.

1 Seventeen-year-old Rohingya girl who fled Myanmar by sea, interviewed by the authors.

2 Sebastien Moretti, ‘Protection in the context of mixed migratory movements by sea: the case of the Bay of Bengal and Andaman Sea Crisis’ (2018) 22 *IJHR* 237.

3 Hereafter ‘women’ is used to include both ‘women and girls’ unless otherwise specified.

4 UNHCR, ‘Mixed Maritime Movements in South-East Asia in 2015’ (Geneva, 2015) 17 <reporting.unhcr.org/sites/default/files/UNHCR%20-%20Mixed%20Maritime%20Movements%20in%20South-East%20Asia%20-%202015.pdf> accessed 5 April 2021.

5 Aubrey Belford and Reza Munawir, ‘Migrants in “Maritime Ping-Pong” as Asian Nations Turn Them Back’ *Reuters* (16 May 2015) <uk.reuters.com/article/ukasia-migrants-idUKKBN0O105O20150516> accessed 5 April 2021.

ensued.⁶ As a result of the closure of borders, some 5,000 Rohingya from Myanmar and Bengalis from Bangladesh were left stranded at sea, most without food or water.⁷ The vessels navigated to the coasts of Thailand, Malaysia and Indonesia, where some were provided with supplies and towed back to international waters.⁸ While the Andaman Sea ‘crisis’⁹ eventually resulted in an agreement among States in the region to resolve the situation, there remained a lacuna in the articulation of the specific experiences of women at sea. While there was a response upon disembarkation by front-line responders (necessarily discreet to protect the privacy and confidentiality of survivors and ensure such services would not be threatened) there was a deafening silence among States responsible to address the sexual violence experienced by these women at the hands of State and non-State actors. This silence continues to shroud the gendered experience of women fleeing by sea. Despite international humanitarian law, international human rights law and international customary law, which strongly prohibit sexual violence,¹⁰ such violence against displaced Rohingya women remains unaddressed and underexplored, and thus continues unabated.

This article argues that the key States involved in the Andaman Sea crisis failed to account for the gendered nature of violence¹¹ experienced by women

6 UNHCR, ‘Mixed Maritime Movements in South-East Asia in 2015’ (n 4) 2. Examples of media reports include: Thomas Muller and Joe Cochrane, ‘Rohingya Migrants from Myanmar, Shunned by Malaysia, are Spotted Adrift in Andaman Sea’ *New York Times* (14 May 2015) <www.nytimes.com/2015/05/15/world/asia/burmese-rohingya-bangladeshi-migrants-andaman-sea.html> accessed 5 April 2021; ‘Rohingya migrants adrift in Andaman Sea – in pictures’ *The Guardian* (15 May 2015) <www.theguardian.com/world/gallery/2015/may/15/rohingya-migrants-adrift-in-andaman-sea-in-pictures> accessed 5 April 2021.

7 UNHCR (n 4) 5.

8 Margie Mason, ‘Up to 6,000 Rohingya, Bangladeshi migrants stranded at sea’ *Associated Press* (12 May 2015) <apnews.com/article/9a5c78c943c540f4a396259ef83dfb40> accessed 5 April 2021.

9 The Andaman Sea situation is described as a ‘crisis’, as it is an area in which international law did not apply to protect the rights of refugee women and where it ought to do so. For more on the role of the ‘crisis’ in furthering human rights in international law, see Benjamin Authers and Hilary Charlesworth, ‘The Crisis and the Quotidian in International Human Rights Law’ in Mielle Bulterman and Willem van Genugten (eds), *Netherlands Yearbook of International Law* (Vol 44, CUP 2013) 19.

10 United Nations Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), ‘General recommendation No. 35 on gender-based violence against women’ (26 July 2017) UN Doc CEDAW/C/GC/35 (GR35) [2]. Gloria Gaggioli, ‘Sexual violence in armed conflicts: a violation of international humanitarian law and human rights law’ (2014) 96 *International Review of the Red Cross* 503.

11 Violence against women is defined as ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public

in interpreting their customary international law obligations and key regional standards, with deadly consequences. The law of the sea, international refugee law, international human rights law, anti-trafficking and anti-smuggling measures, and regional standards all purport to protect women fleeing by sea.¹² Moreover, the prohibition of gender-based violence, including sexual violence, has evolved into a principle of customary international law which establishes the commission of violence against women as a fundamental human rights violation.¹³ In the first instance, these States failed in their positive obligation to prevent and address the commission of sexual violence against women fleeing by sea. Where women experienced egregious violence at sea, this should have been factored into States' customary obligations under the law of the sea to perform rescues. States not only failed to perform rescues and disembark women to a place of safety during the Andaman Sea 'crisis', but some turned them back to sea or returned them to the harm they had fled in Myanmar.¹⁴ Owing to the severity of gendered harm that Rohingya women face in Myanmar on the basis of their ethnicity, they should be considered *prima facie* to be refugees and protected from return to Myanmar by customary principles of international refugee law, notably the prohibition of *refoulement*.¹⁵ Among the plethora of international laws applying to protect women at sea, this article focuses on international customary laws with reference to key regional standards,¹⁶ using a feminist legal lens to undertake a 'gendered' analysis. The importance of this analysis lies in the fact that women will continue to flee by sea, and laws that

or in private life' as cited in UNGA 'Declaration on the Elimination of Violence against Women' (GA Res 48/104) (23 February 1994) UN Doc A/RES/48/104 art 1.

12 See generally Anthony Aust, *Handbook of International Law* (Cambridge University Press 2010); Felicity G Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (Brill Nijhoff 2020); Myron H Nordquist, John Norton Moore and Ronán Long (eds), *Legal Order in the World's Oceans: UN Convention on the Law of the Sea* (Brill Nijhoff 2017); Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003); Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

13 GR35 (n 10) [2].

14 UNHCR (n 4) 9.

15 See Article 33(1) of the 1951 Convention relating to the Status of Refugees: 'No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' For its application at sea, refer to: Guy S Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-refoulement*' (2001) 23 IJRL 443.

16 There are other domestic, regional and international laws that are applicable to address the protection of women at sea, which are beyond the scope of this article. International customary law has universal applicability.

purport to protect them must acknowledge the specific forms of violence they experience.¹⁷

The violence experienced by women fleeing on the Andaman Sea in 2015 is absent from most of the academic literature and reporting on the crisis, as well as from the discourse of States in interpreting international law designed to protect people at sea. To address this absence, the authors conducted interviews with women who fled by sea as well as people who provided assistance to them. After setting out the results of these interviews (Part 2), this article draws on a feminist legal theory to explore why international law was not interpreted by States in Southeast Asia¹⁸ so as to protect women from these harms (Part 3). It concludes with recommendations for a 'gendered' interpretation of the law by States to better protect women (Part 4). The authors have worked with disembarked Rohingya women who faced sexual violence at sea in 2015. They have drawn on their experience working on law, policy and practice in several countries in Southeast Asia to prepare this article, and acknowledge that this experience shaped their analysis.¹⁹

Although this article relies upon case studies to expose the prevalence and gravity of sexual violence committed against women fleeing by sea, it is critical to understand that the evidence of sexual violence, which relies upon survivor disclosure, is not required as a precursor for reform.²⁰ Many survivors experience shame, stigmatisation and reprisals for reporting sexual violence. For this reason, survivor-centred approaches²¹ which protect the safety and dignity of women, including their privacy, are paramount. It is recognised, for example, that safe and ethical incident data collection must comply with a range of strict requirements in order to mitigate the risk of exposing survivors of violence to

17 In a study of women's experiences en route from Somalia to Malta, Gerard and Pickering make the general observation that '[d]irect violence shapes women's experiences of transit through exposure to sexual violence, exploitation, extortion and even death. Despite evidence of agency in some contexts, structural violence is clearly relatable to the broader conditions in which individual and collective violence is experienced.' Alison Gerard and Sharon Pickering, 'Gender, Securitization and Transit: Refugee Women and the Journey to the EU' (2013) 27 *Journal of Refugee Studies* 338.

18 For the purposes of this article, 'Southeast Asia' refers to the ten member States of the Association of Southeast Asian Nations (ASEAN), which includes all of the States most directly involved in the Andaman Sea 'crisis'. Except Bangladesh, these are Myanmar, Thailand, Indonesia and Malaysia.

19 Ezgi Irgil, 'Broadening the positionality in migration studies: Assigned insider category' (2020) *Migration Studies* <doi.org/10.1093/migration/mnaa016> accessed 5 April 2021.

20 The term 'survivor' is used interchangeably with 'victim' for women who have experienced sexual violence to recognise that different women have different preferences for self-identification.

21 See generally for increasing recognition of the importance of survivor centred approaches: UNSC Res 2467 (2019) (23 April 2019) UN Doc S/RES/2467 (2019).

further harm.²² It is unconscionable to require evidence of the extent of sexual violence to activate a response either in law, policy or services, which would place the burden of reporting upon survivors. As such, States must assume the occurrence of sexual violence in all circumstances where women are in a weakened position of power, including and most especially when they are fleeing persecution by sea.

2 Breaking the Silence: Women's Experiences at Sea and the Cycle of Violence on Land

2.1 *The Experiences of Rohingya Women in Myanmar*

The ill-treatment of the Rohingya people, and Rohingya women in particular, in Myanmar has a long history. Eligibility for citizenship in Myanmar primarily follows ethnicity and *jus sanguinis*, descent-based, criteria.²³ 'Rohingya' is not a recognised ethnic group under Myanmar law, making it a challenge for the Rohingya population to establish their citizenship and the rights that flow therefrom. Over many years, the Rohingya have gradually been stripped of access to legal documents, education, healthcare, and employment, as well as denied the right to participate in the political process, sexual and reproductive health rights, and freedom of movement within their country. These rights violations have a specific impact on women. For example, expensive administrative requirements for marriage may leave poorer families who are unable to pay for permission with no option other than to send their daughters to Malaysia to marry.²⁴ Indeed, many of the Rohingya women and adolescent girls attempting to flee persecution during the 2015 crisis did so with wedding dresses packed in their bags.²⁵ Exacerbated by a draconian system of local orders,²⁶ this context provides fertile ground for forced migration.

22 WHO, *WHO Ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies* (Geneva, WHO 2007).

23 José María Arraiza and Olivier Vonk, 'Report on Citizenship Law: Myanmar' (Country Report 2017/14, EUI and Robert Schuman Centre for Advanced Studies October 2017) 5–6.

24 UN Office of the High Commissioner for Human Rights, 'Myanmar: UN Expert Urges Government to Act on Local Regulations Targeting Rohingya Muslims in Rakhine State' (31 May 2013) <<https://www.ecoi.net/en/document/1201190.html>> accessed 5 April 2021.

25 Interview 1 (n 37). See also Claudia Tazreiter, Sharon Pickering and Rebecca Powell, 'Rohingya Women in Malaysia: Decision-Making and Information Sharing in the Course of Irregular Migration' (2017) Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2017/55 <ssrn.com/abstract=3079644> accessed 5 April 2021.

26 For more on the origin and content of the local orders, see The Arakan Project, 'Key issues concerning the situation of stateless Rohingya women in Rakhine State, Myanmar:

More recently, the persecution of the Rohingya in Myanmar has been described as ‘ethnic cleansing’ by the United Nations,²⁷ and is being tried as genocide by the International Court of Justice (ICJ). The use of sexual violence against Rohingya women during the ‘clearance operations’ in Rakhine State of 2017 was so severe that it may be seen as evidence of the Myanmar military’s ‘genocidal intent’ to destroy the Rohingya people.²⁸ The full extent of sexual violence committed as part of the ‘clearance operations’ from around October 2016, including the more widespread clearance operation of August 2017, is extensively documented in the findings of the UN Human Rights Council’s Independent International Fact-Finding Mission on Myanmar (UN Fact-Finding Mission)²⁹ and relied upon as evidence under the *Application Instituting Proceedings and Request for the Indication of Provisional Measures* submitted to the ICJ by the Gambia in November of 2019.³⁰ Those findings affirmed that widespread rape and sexual violence were a hallmark of Myanmar’s ‘clearance operations’. Indeed, the UN Fact-Finding Mission concluded that ‘[r]ape and other sexual ... violence’, including gang rapes, sexually humiliating acts, sexual slavery and sexual mutilations, were ‘perpetrated on a massive scale ...’.³¹ It determined that the ‘main perpetrators were the Tatmadaw, although other security forces, and sometimes ethnic Rakhine men, were also involved’,³² indicating the scale of impunity with which the offences of sexual violence were committed.

While every Rohingya woman has a different story and account of her decision to flee,³³ the context from which each fled was one of

Submission to the Committee on the Elimination of Discrimination Against Women’ (10 June 2016) 5–8 <http://internet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_24280_E.pdf> accessed 5 April 2021. The Union Government announced the abolishment of 8 of the local orders in 2018. Australian Government Department of Foreign Affairs and Trade, ‘DFAT Country Information Report Myanmar’ (18 April 2019) 28 <www.dfat.gov.au/sites/default/files/country-information-report-myanmar.pdf> accessed 5 April 2021. The impact of this announcement is yet to be seen.

27 “No other conclusion,” ethnic cleansing of Rohingyas in Myanmar continues – senior UN rights official’ (*UN News*, 6 March 2018) <news.un.org/en/story/2018/03/1004232> accessed 5 April 2021.

28 *The Gambia v Myanmar* (Application Instituting Proceedings and Request for Provisional Measures) [2019] ICJ Rep 178.

29 Human Rights Council, ‘Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar’ (17 September 2018) UN Doc A/HRC/39/CRP.2.

30 *The Gambia v Myanmar* (n 28).

31 Human Rights Council (n 29) 920.

32 *ibid.*

33 ‘[D]iscrimination of women ... is inextricably linked to other factors that affect them, such as race, ethnicity, religion, health, status, age, class, caste, sexual orientation and gender identity. This distinction will have a bearing on how discrimination or marginalization affects women belonging to these groups, often differently from men. Understanding the

marginalisation.³⁴ The institutional, structural and individual discrimination experienced by these women, within a situation being tried as genocide at the ICJ, is fundamental to an understanding of the primary drivers for movement and the continuation of harm during flight by sea.³⁵ It means that Rohingya women are left with little choice but to turn to people smugglers and traffickers to travel by sea in seeking a place of safety.³⁶

2.2 *The Experiences of Rohingya Women at Sea and Beyond*

There is no publicly available data on the incidents of sexual violence that occurred at sea during the peak periods of boat movements across the Andaman Sea culminating in the ‘crisis’ of 2015. What little is known is what has been recounted by survivors who endured the journeys and disembarked either in Thailand or back in Myanmar. The first-person testimonies of these survivors, as well as front-line responders, are presented in this article to highlight the experiences of women during and after these journeys.³⁷ These testimonies are based on interviews conducted by the authors using ethical standards for interviewing on sensitive subject matter.³⁸ Strict safeguards

intersectionality of these factors will assist in informing how Rohingya women ... are affected in unique ways ...’. Human Rights Council, ‘Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts’ (22 August 2019) UN Doc A/HRC/42/CRP.4 [54–55].

34 Wai Wai Nu, ‘Layers of Marginalisation: Life for Rohingya Women Testimony from Myanmar’ (2016) 16 *The Equal Rights Review* 223.

35 The UN draws attention to the nexus between gender inequality and sexual violence throughout Myanmar, in particular the inequality faced by girls from ethnic minorities such as the Rohingya. Although the link between gender inequality and sexual violence is seen worldwide, Myanmar is particularly ‘prone’ to sexual violence owing to its poor record on gender inequality. Myanmar ranks 148 out of 189 countries in the United Nations’ Gender Inequality Index (UNDP, ‘Gender Inequality Index’ (2018)). See Human Rights Council (n 33) [48–53].

36 Sara E Davies and Jacqui True, ‘The politics of counting and reporting conflict-related sexual and gender-based violence: the case of Myanmar’ (2017) 19(1) *IFJP* 4; UN, ‘Report of the Secretary-General on Conflict-related Sexual Violence’ (S/2016/261, 20 April 2016) [52–53] <www.un.org/sexualviolenceinconflict/wp-content/uploads/report/s-2016-361/SG-Annual-Report-spread-2015.pdf> accessed 5 April 2021; Puttanee Kangkun, ‘One Year After the Andaman Sea Refugee Crisis: End Detention and Bring Justice to Survivors of Human Trafficking’ (Bangkok, Fortify Rights 8 June 2016) <www.fortifyrights.org/downloads/Remarks_20160608.pdf> accessed 5 April 2021.

37 The interviews are as follows: Interview 1 with anonymous (Yangon, Myanmar, 10 May 2020); Interview 2 with anonymous (Kuala Lumpur, Malaysia, 6 June 2020); Interview 3 with anonymous (Kuala Lumpur, Malaysia, 15 June 2020).

38 The authors conducted interviews to obtain information about sexual violence perpetrated against Rohingya women on Andaman Sea journeys, using interview techniques appropriate to the sensitive subject matter. See for example: Virginia Dickson-Swift and others,

were in place for the women interviewed, including obtaining consent in the Rohingya language, ensuring confidentiality, providing information of available support services and following up with interviewees.³⁹

The experiences of Rohingya women at sea are characterised by sexual violence, death and deprivation of food and water.⁴⁰ One Rohingya girl who was aboard a vessel to Malaysia for 70 days explained:

There were 200 women [and girls] on the boat. I talked to them. I sleep with other women. Women and men were separated. Three men died. They were sick. No health care. The boat was so overcrowded. I was worried about my brother and myself to have died like the other man. Or what if the boat sinks? At the beginning we had food, later we didn't get a meal. We only had a teacup and water two times a day. There were some days with no meals at all. I was hungry. Two days no meal at all. All the time we were under the sun, and rain. No roof or shade. We shared among each other about sadness and sickness.⁴¹

Reproductive health problems emerged owing to the lack of water and sanitation. As one girl explained: 'I didn't take a shower the whole time...There wasn't water to shower on the boat. Women had a hard time during the period time although we brought pads with us. I tell myself that it is my faith to face this hardship.'⁴²

Women aboard the vessels provided extensive testimonies about being repeatedly raped by the captain and crew members over the months that they were at sea, and witnessing the rape of several girls and women.⁴³ One girl explained that she saw another girl being taken by several adult men: 'I saw that the girl was taken to the room. Shipowners, they were Burmese, from Yangon. [One Burmese man] and seven other men. The oldest man was a married man,

'Researching Sensitive Topics: Qualitative research as emotion work' (2009) 9 *Qualitative Research* 61. Due to Covid-19 travel limitations, the interviews were conducted through secure calls.

39 For example, participation was voluntary and not remunerated; consent forms were read in Rohingya language; interviews were conducted in Rohingya language; counsellor details were provided for any mental health follow-up; and records of interviews were securely stored.

40 'Malaysia: End Child Marriage, Protect Rohingya Refugee Girls' (Fortify Rights 21 February 2019) <www.fortifyrights.org/mly-inv-jnr-2019-02-21/> accessed 5 April 2021.

41 Interview 3 (n 37).

42 Interview 3 (n 37).

43 Interviews 1, 2 and 3 (n 37).

he has adult children. The other four men were adult men. Two others were boys, they were young and they didn't do anything.'⁴⁴

Another girl, who was accompanied by her brother, explained that women who were not accompanied by family members were targeted for rape:⁴⁵ 'The head, or "sayar", took more girls. They called the same women every day. Five women were raped. All of them were single. Women who were not accompanied by any other family member. And they were weak. They were the beautiful ones.' Women and adolescent girls reported that they were provided with 'pills to prevent pregnancy'.⁴⁶

Despite assurances of safety upon disembarkation,⁴⁷ testimonies indicated that 'they trusted no one'.⁴⁸ Upon disembarkation, women presented with skin conditions as a result of a lack of water to bathe and were visibly afraid; afraid of going home, of the authorities and, for those returned to Myanmar, of the local Rakhine community and how they would cope mentally.⁴⁹ Further, for many the violence they were exposed to on water continued on land. One woman who disembarked in Thailand reported: 'I saw four women raped by Thais. The Thai person and the "dalal" (broker) were together. The "dalal" knew that girls were raped. Three women from our group were taken. Beautiful ones. Young girls. They brought them to the hilly area.'⁵⁰

Women disembarked into a cycle of violence. Public reports indicate that girls of 15 or 16 years of age who were held hostage in the jungle camps of southern Thailand had no choice but to be sold onwards into marriage.⁵¹ Upon arrival to their final destination in Malaysia, child brides reported being sold to husbands who physically and verbally abused them and sentenced them to a life of domestic servitude.⁵² One woman explained: 'My husband received me in Malaysia. I am not happy here. I always want to go back home to my country and stay with my Mom.'⁵³ Returning home to Myanmar was not an option.

44 Interview 3 (n 37).

45 She also explained, 'Boys were abused sometimes. Men got less food. When I looked at my brother, I was very sad', *ibid.*

46 Interview 1 (n 37).

47 *ibid.*

48 *ibid.*

49 *ibid.*

50 Interview 2 (n 37).

51 Rozanna Latiff and Ebrahim Harris, 'Sold into marriage – how Rohingya girls became child brides in Malaysia' *Reuters* (Kuala Lumpur, 15 February 2015) <www.reuters.com/article/uk-myanmar-rohingya-childbrides-insight/sold-into-marriage-how-rohingya-girls-become-child-brides-in-malaysia-idUSKBN15U009> accessed 5 April 2021.

52 *ibid.*

53 Interview 2 (n 37).

Furthermore, it was well understood from the gathered testimonies that the consequences of reporting sexual violence for the purposes of justice would not be in the best interests of the women, due both to the lack of recourse available to them through the formal justice system when returned to Myanmar, as well as the shame they would bring upon their families and, in some cases, reprisals. The sexual violence was therefore committed, in the view of one person assisting sexual violence survivors, with ‘entitlement and impunity’.⁵⁴ Nevertheless, despite this impunity, and the sexual violence, deprivation and cruelty experienced during their boat journeys, many Rohingya women who disembarked in Myanmar expressed their intention to flee by sea again.

3 International Law, Regional Standards and the Failure to Protect Women at Sea

In form and content, international law and regional standards do not fully address the risks women are exposed to before, during and following flight by sea. The high seas are regulated by several areas of international law, including long-standing customary principles, as well as regional standards such as soft law instruments of the Association of Southeast Asian Nations (ASEAN) and the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime. However, despite these laws, States fail to address sexual and gender-based violence against women fleeing by sea. The following section draws on feminist legal theory to interrogate why these laws failed Rohingya women at sea,⁵⁵ focusing on three of Edwards’ feminist critiques of international law and human rights in particular.⁵⁶

3.1 *Ignoring Women’s Experiences in Interpreting Refugee and Human Rights Law*

First, Edwards highlights the absence of women and women’s voices in the international legal system.⁵⁷ In the context of violence against women, Charlesworth, Chinkin, and Wright explain that ‘[b]ecause men generally are not the victims of sex discrimination, domestic violence, and sexual degradation and violence, for example, these matters can be consigned to a separate

54 Interview 1 (n 37).

55 Nancy Levit and Robert R. M. Verchick, *Feminist Legal Theory: A Primer* (New York University Press 2006) 15–16; Alice Edwards, *Violence Against Women Under International Human Rights Law* (Cambridge University Press 2011) 36–37.

56 *ibid* ch 2.

57 *ibid* 43.

sphere and tend to be ignored.⁵⁸ Certainly, in the response to the Andaman Sea ‘crisis’, the unique experiences of women were ignored. Sexual and gender-based violence against women prior to flight, at sea, and following disembarkation was not given due consideration by Southeast Asian States, nor did it inform how States interpreted and applied their international obligations.

Whether or not States which border the Andaman Sea are parties to the main international refugee and human rights law treaties,⁵⁹ they are bound by the *non-refoulement* rule in customary international law,⁶⁰ as recognised by courts,⁶¹ scholars⁶² and the United Nations High Commissioner for Refugees.⁶³ Owing to the severity of harm that the Rohingya face in Myanmar on the basis of their ethnicity, they should all have been considered *prima facie* refugees and protected against return. However, while Rohingya men were also *refouled*, women faced additional specific and gendered harms that States should have taken into consideration in determining their responses to the crisis. Given the violence to which women were exposed both prior to and during their flights by sea, the failure of States to rescue them from those vessels, as well as the decision to turn them back at sea and potentially return them to the gendered harms they had fled in Myanmar, can be construed as a breach of their *non-refoulement* obligations. By managing the situation solely as a matter of law enforcement, States exposed women to continued sexual violence at sea and, for some, back in Myanmar. The fact that the only option for many disembarked women was to attempt the journey again further demonstrates the failure of States to respect the customary prohibition against *refoulement*.⁶⁴

58 Hilary Charlesworth, Christine Chinkin and Shelley Wright, ‘Feminist Approaches to International Law’ (1991) 85 Am J Int’l L 613, 625.

59 None of the States directly involved in the Andaman Sea ‘crisis’ of 2015 (Myanmar, Thailand, Malaysia and Indonesia) are signatories to the 1951 Convention relating to the Status of Refugees or its Protocol of 1967.

60 Goodwin-Gill (n 15) 444.

61 A controversial decision in the United States of America held that *non-refoulement* obligations do not apply extraterritorially, in *Sale v Haitian Centers Council* 509 US 155, 156 (USSC 1993). However, ‘judgments by a few domestic courts should, at most, be discussed as aspects of comparative law, but cannot claim to be binding under international law’. Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, ‘Border Controls at Sea: Requirements Under International Human Rights and Refugee Law’ (2012) 21(2) IJRL 256, 266.

62 ‘[I]t applies to the actions of states, wherever undertaken, whether at the land border, or in maritime zones, including the high seas’. Guy S. Goodwin-Gill (n 15) 444. See also Sir Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of *Non-Refoulement*: Opinion’ in Feller, Türk and Nicholson (eds) (n 12) 149–163.

63 UNHCR, ‘Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’ (26 January 2007) 15 <www.unhcr.org/4d9486929.pdf> accessed 5 April 2021.

64 Interview 1 (n 37).

States also failed to apply regional human rights standards to protect refugee women at sea.⁶⁵ The 1967 Bangkok Principles (re-affirmed in 2001 following Addendums made in 1970 and 1987) call for member States of the Asian-African Legal Consultative Organisation (AALCO) to ensure that those seeking asylum are able to do so, and that the specific situations of women are addressed.⁶⁶ These are non-binding, however. The non-legally binding 2012 ASEAN Human Rights Declaration also includes specific reference to the right to seek asylum.⁶⁷ The Declaration of the Advancement of Women in the ASEAN Region and Declaration on the Elimination of Violence Against Women in the ASEAN Region also purport to recognise and value women's voices. However, there has been little political will to implement these principles in any practical way during times of crisis. Regional standards to protect refugee women in particular tend to be ignored or not prioritised by States in practice. The protection of women is largely subsumed by a law enforcement paradigm that privileges the integrity of borders over the integrity of women's bodies.

3.2 *Privileging Men's Reality*

Edwards' second critique is that human rights are 'men's rights', and international human rights law 'privileges the realities of men's lives while it ignores or marginalises those of women.'⁶⁸ The reasons for this exclusion include structural as well as formal inequalities caused by 'patriarchy, exclusion, and oppression, combined with poverty, harmful or discriminatory cultural and religious practices, and political disenfranchisement'.⁶⁹ Gendered and social norms which dictate attitudes and practices influence the space for women's exercise of power in families and communities as well as in political decision making. The power imbalance reinforces reduced access to education, health and other basic services which creates structural systems of exclusion. Where international human rights instruments specifically protect women's rights,

65 A clear, consistent and binding legal framework for the protection of refugees has eluded ASEAN Member States for decades. With the exception of anti-smuggling and anti-trafficking rules described in the next section, the protection of refugee women has been relegated to various non-binding regional instruments which have evolved over time.

66 See Article IV(6) in particular.

67 Article 16 states that, 'Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements.'

68 Edwards (n 55) 53. Catharine MacKinnon stated that human rights are not women's rights, 'not in theory or in reality, not legally or socially, not domestically or internationally'. Catharine A. MacKinnon, 'Rape, Genocide, and Women's Human Rights' (1994) 17 Harv Women's LJ 5, 5.

69 Edwards (n 55) 51.

feminist legal theorists argue that they carry less legal value.⁷⁰ International human rights law ignores or belittles violations faced by women, including ‘forced childbirth, sexual slavery, rape, genital mutilation, female infanticide, domestic violence, sexual harassment, gender-based violence, reproductive freedom, education, the right to vote, economic policies, and structural adjustment programmes’.⁷¹ Other areas of international law suffer from the same bias. As demonstrated in this article, the international law of the sea, in particular the customary principles of rescue at sea and of *non-refoulement*, marginalise women’s realities in their application.

The duty to rescue people in ‘distress’ at sea is considered to be part of customary international law.⁷² In defining persons in distress, there is no provision for the specific experiences of women, and in particular the experience of sexual violence which is the reality for women at sea.⁷³ The lack of recognition of sexual violence as ‘distress’, and the failure of States to rescue on this basis during the Andaman Sea crisis, resulted in women being trapped for weeks on boats where they were exposed to further rape and sexual violence, endangering their lives.⁷⁴

70 Hilary Charlesworth and Christine Chinkin, ‘The Gender of Jus Cogens’ [1993] 15 HRQ 63.

71 Edwards (n 55) 54. See also Edward Broadbent, ‘Getting Rid of Male Bias’ in Joanna Kerr (ed), *Ours By Right: Women’s Rights as Human Rights* (North-South Institute, Zed Books 1993) 10 and Berta E. Hernández-Truyol, ‘Human Rights through a Gendered Lens: Emergence, Evolution, Revolution’ in Kelly D. Askin and Dorean M. Koenig (eds), *Women and International Human Rights Law* (Vol 1, 3) 2.

72 Mark Pallis argues that ‘the customary status of a duty to rescue was strengthened by the existence of the duty in UNCLOS and the ICMSR and the consequent increase in states party to a rescue, and a search and rescue obligation. Additionally, although there have not been any General Assembly Resolutions on the subject, both the Council of the International Maritime Organization and UNHCR have formally expressed their view of the duty to render assistance as a fundamental obligation. From this it may be concluded that the duty to render assistance can be characterised as a norm of customary international law and binding on all states.’ Mark Pallis, ‘Obligations of States towards Asylum Seekers at Sea: Interactions and conflicts between legal regimes’ (2002) 14 IJRL 329, 334; the duty to rescue is also contained in 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 3 (UNCLOS) art 98(1).

73 Pallis (n 72) 335.

74 The UN Human Rights Committee has found that a failure to rescue violated Article 6 of the ICCPR, as Italy failed to respond promptly to various distress calls from a sinking boat carrying more than 400 adults and children and failed to explain a delay in dispatching its navy ship located an hour from the scene. See UN Human Rights Committee, ‘Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No. 3042/2017’ (27 January 2021) UN Doc CCPR/C/130/D/3042/2017 <tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/130/DR/3042/2017&Lang=en> accessed 5 April 2021.

In any case, the requirement for women to define their experience of sexual violence within the male rubric of 'distress' is inappropriate. Sexual violence should not be hidden behind such a term, which is grossly inadequate to describe months of limited food and water, combined with systematic and repeated rapes and the premeditated provision of contraceptive pills. Such treatment should have been more than sufficient to reach the minimum threshold to be construed as 'distress' and trigger States' rescue obligations.

Of even greater concern is the burden on women who have endured such sexual violence to disclose it publicly somehow, and in doing so risk further sexual violence or loss of life as reprisal, in order to access rescue under international law. Rescues must be undertaken and disembarkation to places of safety to prevent ongoing threats to the lives of women and girls. It should be assumed that these threats persist given the limitations on reporting whilst at sea. Instead of such a requirement, States should assume that women fleeing by sea may be subject to such sexual violence on their vessels, and undertake rescues and disembarkation to places of safety at the earliest opportunity and without public disclosures of rape.

3.3 *Anti-Trafficking, Anti-Smuggling and the Patriarchal Role of the State*

Edwards' third critique challenges the assumption that women's issues are confined to the 'private' sphere. She advocates for a nuanced approach to arguments around the public/private divide in international law, arguing that '[m]ost so-called "private" issues do have public dimensions, either because they are subject to regulation under law (the problem is often *how* they have been regulated rather than a lack of regulation) or because they are grounded in public systems of oppression, patriarchy, or gendered international relations.'⁷⁵ This critique is particularly relevant to the patriarchal law enforcement paradigm that dominates States' responses to situations like the Andaman Sea crisis, and is ill-suited to protect women from sexual violence during and following flight by sea. Anti-trafficking laws designed to protect women from harm are made by men and for the protection of state interests, causing women fleeing persecution further harm. The sexual violence they face remains in the 'private' realm and is unaddressed.

The two main anti-trafficking and anti-smuggling laws applicable in Southeast Asia are the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP)⁷⁶ and the Bali Declaration on People

⁷⁵ Edwards (n 55) 71.

⁷⁶ For ratifications, see: 'Instruments of Ratification' (Association of Southeast Asian Nations) <agreement.asean.or/greemen/etai/30.html> accessed 5 April 2021.

Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Declaration). The ACTIP is the only legally binding instrument in Southeast Asia and is focused on States legislating domestically to prevent and respond to the needs of trafficking victims, as well as law enforcement. It references cooperation, but does not go far enough to prescribe how people can access justice for violations at sea. Article 5 calls for 'higher penalties' for offences against certain categories of vulnerable persons, including children or people with disabilities, but does not describe survivors of sexual violence. The ACTIP entered into force in November 2015, just months after the Andaman Sea crisis, and it acknowledges sexual violence as a component of trafficking but fails to address sexual violence at sea or elsewhere. This is a glaring omission.

By contrast, the Bali Declaration does recognise the specific vulnerabilities of women and children who are migrants and refugees in the region (para 3), but the generic description of women as 'vulnerable' fails to acknowledge their specific risks and experiences of sexual violence. The declaration calls for temporary protection regimes and local stay arrangements (para 6), as well as respect for the principle of *non-refoulement* (para 5), but overall remains firmly rooted in a law enforcement approach and does little to promote the need for concrete action to be taken in relation to human rights violations that occur at sea, including rescue of women at sea.

The patriarchal law enforcement paradigm adopted by Southeast Asian States in response to flight by sea is also supported by international law. The international law of the sea permits policing of boats for clearly defined purposes, such as combatting slavery.⁷⁷ International law is inconsistent in relation to the legality of interceptions of boats on the basis of suspected people smuggling or trafficking of 'irregular migrants', whether on the high seas or in their territorial waters.⁷⁸ The United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, 2000, ratified by all coastal states of the Andaman Sea, sets out the rules for a State to search a vessel suspected of smuggling people consistently with international law of the sea rules. This Protocol does not affect other rights of individuals in international refugee law,

77 Article 8 of the 2000 United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2000 (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507 (UN Protocol Against Smuggling).

78 Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 IJRL 174, 187–188.

making specific reference to the *non-refoulement* principle.⁷⁹ Article 16(1) of the Protocol requires States to protect the rights of smuggled persons, including the right to life. Article 16(2) requires that States provide appropriate protection against violence that may be inflicted upon smuggled persons, whether by individuals or groups. The laws are silent on the protection needs of smuggled women and girls specifically, and it cannot be presumed that they will be read into Articles 16(1) or 16(2) of the Protocol.

The abovementioned international and regional laws, and the anti-trafficking and anti-smuggling measures they support, are the primary vehicle through which Southeast Asian States protect women fleeing by sea. But addressing this flight from a patriarchal law enforcement perspective is inappropriate. Since the escape of Rohingya women by sea from Myanmar is difficult without the assistance of smugglers,⁸⁰ States' focus on suppressing smuggling and trafficking through the Andaman Sea risks cutting off vital modes of escape for Rohingya women, and fails to address their specific protection needs during flight. This approach perpetuates border protection grounded in a system of oppression that protects the interests of the State while causing further harm to women. Law enforcement must be undertaken alongside the protection of women; these aims should be complementary.

4 Conclusion

During the Andaman Sea crisis in 2015, Rohingya women and girls experienced violence that went largely unreported and unaddressed, despite the gravity and criminality of these acts. Five years later, in April 2020, Rohingya women were again trapped at sea for months, unable to return to Bangladesh or disembark in Malaysia.⁸¹ Given the prevalence of violence against women in the region,

79 UN Protocol Against Smuggling (n 77) art 19.

80 There are land routes for Rohingya to leave Rakhine that are arguably more dangerous: '[M]ost Rohingya wishing to escape from villages and camps in Rakhine are taken on a largely overland route that either leaves the state via the Rakhine Yoma mountain range, progressing through Magway and Bago regions, or begins with a boat trip down the coast to southern Rakhine or Ayeyarwady Region, where they are transferred to buses or cars. From Magway, Bago and Ayeyarwady regions, they travel past Yangon to Myawaddy, where their journey continues through Thailand to Malaysia.' Ye Mon, Eaint Thet Su and Ben Dunant, 'No exit: Rohingya jailed en masse for escaping Rakhine' *Frontier Myanmar* (15 January 2020) <frontiermyanmar.net/en/no-exit-rohingya-jailed-en-masse-for-escaping-rakhine> accessed 5 April 2021.

81 Hannah Beech, 'Hundreds of Rohingya Refugees Stuck at Sea with "Zero Hope"' *New York Times* (1 May 2020) <www.nytimes.com/2020/05/01/world/asia/rohingya-muslim-refugee-crisis.html> accessed 5 April 2021.

the context from which these women fled, and decades of women's experience fleeing by sea in the region, there is a strong likelihood that these women were exposed to sexual violence. Our interview data confirms this. Again, there was no documentation of sexual violence including rape, no gendered analysis of the harm, and no protection afforded at sea by States. Rape, fear and subsequent silence remain the reality for women at sea.

At all times, there must be an assumption of the incidence of sexual violence amongst populations fleeing by both land and sea.⁸² Obtaining information about the sexual and gender-based violence experienced by women, in line with the relevant ethical standards, is an essential first step towards preventing and responding to this harm. The next step is using that information to ensure women fleeing by sea can in fact access protection against, and redress for, the specific harms they face. This is not simply a matter of making more law. There has already been a proliferation of international and regional laws, frameworks and policies developed supposedly to protect women from sexual violence in the decades since the Indochinese exodus in the mid-1970s. In practice, though, they have offered little or no protection to women fleeing by sea. Laws that are problematic on land completely fail at sea. But the interpretation of these laws from a feminist legal perspective provides an opportunity to identify areas of potential reform.

In light of information about gendered violations, States must evaluate their international, regional and domestic human rights and refugee law obligations, as well as their obligations under the law of the sea, to ensure the specific protection needs of women inform how they interpret their obligations to rescue vessels in distress and to respect the prohibition on *refoulement*. This evaluation should prompt the development of gender-sensitive and survivor-centred⁸³ procedures to guide search and rescue operations and disembarkation and reception arrangements. States should also interrogate how anti-trafficking and anti-smuggling laws, which purport to protect

82 'Over 35% of women globally will face sexual and/or intimate partner violence in their lifetime. In humanitarian crises, levels of these and other forms of violence based on gender inequality ... grows more acute.' See generally, WHO, 'Gender-based violence in health emergencies' <[www.who.int/health-cluster/about/work/other-collaborations/gender-based-violence/en/#:~:text=Over%2035%25%20of%20women%20globally,based%20violence\)%20grows%20more%20acute](http://www.who.int/health-cluster/about/work/other-collaborations/gender-based-violence/en/#:~:text=Over%2035%25%20of%20women%20globally,based%20violence)%20grows%20more%20acute)> accessed 5 April 2021; see also Lindsay Stark and Alistair Ager, 'A Systematic Review of Prevalence Studies of Gender-Based Violence in Complex Emergencies' (2011) 12 *Trauma, Violence & Abuse* 127.

83 UNFPA, 'Minimum Standards for Prevention and Response to Gender-Based Violence in Emergencies' (2015) 11 <www.unfpa.org/sites/default/files/pub-pdf/GBVIE.MinimumStandards.Publication.FINAL_ENG_.pdf> accessed 5 April 2021; UNSC Res 2467 (2019) (n 21).

women and girls, in reality privilege the protection of the integrity of borders. Law enforcement measures cut off vital routes of passage for women trying to escape violence, while prosecutions for trafficking fail to achieve justice for survivors. States have an obligation to ensure that violations against women can be addressed through domestic courts, separate from trafficking offences.

The most important question for many of the women and girls who fled Myanmar by sea is if and when it will be safe for them to return to Rakhine. As one woman in Malaysia explained: '[I] can forget the boat experience but... [s]eeing my village burn and villagers killed...[was] the most heart-breaking feeling and experience. I want to return home if there is peace.'⁸⁴ The violence that Rohingya women fled in Myanmar must be addressed by States to enable return in safety and dignity,⁸⁵ especially following the military coup of 1 February 2021.⁸⁶

Breaking the silence about sexual violence is only the start of driving forward an agenda to protect women at sea. The next steps are for States to recognise these experiences in interpreting customary law principles from the law of the sea, international human rights law and refugee law and translate these into action. Legal reform and political commitment to recognise the specific and egregious experiences of women at sea are paramount to prevent continued violations.

84 Interview 2 (n 37).

85 While outside the scope of this article, future research remains to be undertaken on the specific legal frameworks and policies that would be needed to support safe and dignified return for women who have experienced sexual violence throughout their journeys.

86 'Myanmar crisis: UN chief "appalled" by escalating violence with dozens reported killed over weekend' *UN News* (15 March 2021) <news.un.org/en/story/2021/03/1087332> accessed 5 April 2021.

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